



1200 EIGHTEENTH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.HARRISWILTSHIRE.COM

ATTORNEYS AT LAW

October 22, 2007

Ex Parte

Ms. Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *Petition for Rulemaking of Fibertech Networks, LLC*, RM-11303.

Dear Ms. Dortch:

Fibertech Networks, LLC, hereby updates the record and reiterates the need for the rulemaking requested by Fibertech Networks on December 7, 2005.¹ The time has come for the Commission to ensure fair and nondiscriminatory access to poles and conduit. In March of this year, responding to questions from Senators Inouye and Stevens, Chairman Martin both recognized the importance of pole attachment regulation to broadband deployment and suggested the Commission would soon issue a Notice of Proposed Rulemaking.² Six months have passed, and the need for a rulemaking is only becoming more urgent with each passing day. Opening a rulemaking to address the proposals advanced by Fibertech is a critical first step in ensuring access to these building blocks of facilities-based competition and facilitating advanced broadband deployment.

In moving forward with a rulemaking, the Commission should recognize the benefits of a presumption in favor of boxing poles by tentatively concluding that such a presumption is appropriate at the federal level. Fibertech's experience in Connecticut alone – where Fibertech has already deployed more than 1,600 route miles of fiber –

¹ Petition for Rulemaking of Fibertech Networks, LLC, RM-11303, filed December 7, 2005 ("Petition").

² Letter from Kevin J. Martin, Chairman, Federal Communications Commission to Daniel K. Inouye, Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, and Ted Stevens, Vice Chairman, Committee on Commerce, Science and Transportation, U.S. Senate, at 11 (March 12, 2007).

demonstrates that pole boxing is a safe and effective means of facilitating competitive fiber deployment.

This submission proceeds in two parts. First, we emphasize that Fibertech's Petition should be a key component in the Commission's efforts to promote broadband deployment. Facilities-based competitive providers of advanced telecommunications, like Fibertech, require full and fair access to poles and conduit to invest in, and expand the reach of their broadband networks. Second, we call to the Commission's attention a number of developments since Fibertech filed its petition that amplify the need for the Commission to initiate a rulemaking to reform its current pole and conduit regulations. In particular, Fibertech urges the Commission to follow states like Connecticut and adopt a presumption that boxing – the practice of attaching wires on the opposite side of the pole from existing lines – is reasonable. Indeed, the Connecticut experience demonstrates that by adopting that one reform, the Commission can promote significant competitive fiber investment and broadband deployment.

I. FULL AND FAIR ACCESS TO POLES AND CONDUIT WILL ADVANCE BROADBAND DEPLOYMENT.

Fibertech's Petition should be at the core of any comprehensive broadband agenda. The Commission has made advanced broadband deployment its "highest priority."³ As Chairman Martin has emphasized, the Commission "has worked hard to create a regulatory environment that promotes broadband deployment."⁴ Specifically, it has "removed legacy regulations . . . that discourage carriers from investing in their broadband networks," and "worked to create a regulatory level playing-field among broadband platforms."⁵

The Commission's cable franchise order and broadband classification orders sought to do just that.⁶ In its cable franchise order, the Commission found that certain

³ Chairman Martin's Statement Before the Senate Commerce, Science & Transportation, at 3 (Sept. 12, 2006), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-267390A1.pdf.

⁴ Chairman Martin's Statement Before the Committee on Energy and Commerce U.S. House of Representatives, at 3 (March 14, 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-271486A1.pdf.

⁵ *Id.*

⁶ See *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, Report and Order and Further Notice of Proposed Rulemaking, MB Docket No. 05-311, FCC 06-180 (March 5, 2007) ("Wireline Broadband Order"); *United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, Memorandum Opinion and Order, 21 FCC Rcd 13281 (2006) ("BPL Order"); *Appropriate Regulatory*

practices of local franchising authorities delayed or derailed competitive entry in the video programming distribution market. As the Commission explained, such delays not only impaired video competition but also discouraged “investment in the fiber-based infrastructure necessary for the provision of advanced broadband services.”⁷

Accordingly, the Commission set out rules and guidelines to prevent such practices in order to create a level playing field for video services, remove “barriers to infrastructure investment,”⁸ and promote “the congressional goal of encouraging broadband deployment.”⁹

The Commission’s decision to classify wireless broadband Internet Access service is likewise designed to promote its “goal of ubiquitous availability of broadband to all Americans.”¹⁰ As Chairman Martin explained, the Commission’s classification decision “eliminates unnecessary regulatory barriers,” “encourage[s] investment, and promote[s] competition in the broadband market.”¹¹ The Commission has since extended this approach to broadband over powerline (“BPL”) Internet access services,¹² with Chairman Martin emphasizing that Commission action to foster development of these services is “critical” and affirming the importance of treating providers “of the same service . . . in the same manner regardless of the technology that they employ.”¹³

The very principles that led the Commission to adopt video franchising reform and address broadband classification for wireline, wireless and BPL compel action here. Reform of pole and conduit regulation is essential not only to level the playing field for facilities-based competition, but also to promote deployment of advanced broadband facilities. Poles and conduit, which are the foundation of any modern communications network, are classic bottleneck facilities. As Fibertech’s Petition explained, the current regulatory regime is insufficient to prevent pole owners from engaging in a variety of practices that unreasonably constrain competitors’ access to those facilities. These anti-competitive practices, moreover, delay and, in some cases, derail efforts to enhance and expand broadband networks. By adopting the best practices for pole and conduit access

Treatment for Broadband Access to the Internet Over Wireless Networks, Declaratory Ruling, 22 FCC Rcd 5901 (2007) (“*Wireless Broadband Order*”).

⁷ *Wireline Broadband Order* at ¶ 3.

⁸ *Id.* at ¶ 4.

⁹ *Id.* at ¶ 3. As the Commission is well aware, Section 706 of the telecommunications Act directs the Commission to encourage the deployment of advanced telecommunications to all Americans. See Pub. L. 104-104, Title VIII, § 706 (Feb. 8, 1996) (codified at 47 U.S.C. § 157 note).

¹⁰ *Wireless Broadband Order* ¶ 2.

¹¹ *Id.* at Statement of Chairman Kevin J. Martin.

¹² *BPL Order*.

¹³ *Id.* at Statement of Chairman Kevin J. Martin.

set out in Fibertech's Petition, the Commission can remove such barriers to entry, which will not only encourage facilities-based competition, but also enable deployment of broadband by competitors today and foster investment and further deployment in the future. Further, by ensuring fair and nondiscriminatory access to poles and conduit, the Commission can ensure that competition to deploy broadband services between pole owners and new entrants takes place on a level playing field.

Evidence from states that have addressed pole access reforms bears out this promise. In New York and Connecticut, states where regulators have adopted significant and fair-minded reforms, Fibertech has been able to expand broadly and respond quickly to customer demand. In those states, Fibertech has built on its established dark fiber offerings by deploying PON equipment in all of its markets and using its lit fiber to offer high speed services to carriers, enterprise customers, and end users. Fibertech's dedicated Internet access service, for example, consists of a secure, fully interoperable and scalable suite of connections, delivered via TDM or Ethernet, offering customers access at speeds from 3 to 1000 Mbps as well as the ability to readily migrate among these service levels as their bandwidth needs change.

In addition, Fibertech plans significant geographic expansion, seeking to roughly double the number of markets it serves over the next five years. Because Fibertech's customers increasingly want lit fiber services, and expect Fibertech to provide these services within weeks, not months, the success of Fibertech's planned expansion will depend in large part on Fibertech's ability to obtain access to poles and conduit in time frames that reflect these market realities. The Commission can drive expansion of alternative access facilities by, among others, competitors like Fibertech while promoting investment in broadband infrastructure by opening a rulemaking, examining the issues raised by Fibertech's Petition, and adopting pro-competitive final rules.

II. NEW DEVELOPMENTS ONLY REINFORCE THE NEED FOR COMMISSION ACTION.

In the twenty-two months since Fibertech filed its petition, there have been a number of developments that reinforce the need for the Commission to take action.

A. Fibertech's Success Illustrates the Safety, Feasibility, and Competitive Benefit of Boxing Poles.

In its Petition, Fibertech proposed a series of pole and conduit access best practices drawn from existing precedent and industry practices. As Fibertech's own network deployment demonstrates, adoption of these practices would dramatically increase the deployment of fiber, including crucial last-mile fiber, in all covered areas.

Fibertech's experience since it filed its Petition, moreover, shows that by simply ensuring widespread access to boxing, the Commission can dramatically increase fiber deployment. In Connecticut, where Fibertech has been directed by the pole owners to use

boxing¹⁴ as a standard practice, Fibertech has already deployed more than 1,600 route miles of fiber. Boxing has allowed Fibertech to avoid costly and time-consuming make ready work without compromising public safety.¹⁵ Maine recently adopted a similar approach to boxing, recognizing that Verizon had regularly used boxing for reasons of speed and efficiency and extending equal access to competitors.¹⁶ In stark contrast, Fibertech has not been able to achieve the same speed or geographic scope of fiber deployment in states without such presumptions.

In light of this concrete evidence of the benefits of boxing, the Commission should go beyond Fibertech's initial boxing proposal and adopt Connecticut and Maine's approach. This simple reform alone would significantly reduce obstacles to competitive fiber deployment.¹⁷

Finally, because of the strong record of state adoption of this practice, and the demonstrated competitive effects of reasonable boxing policies, the Commission should tentatively conclude that boxing is presumptively available to competitors where (1) boxing is performed in accordance with the NESC and applicable state and federal regulations and safety codes and (2) facilities on the pole may be safely accessed by ladder or bucket truck. The ability of a pole owner to rebut the presumption that boxing is permitted will ensure that in the rare case where these conditions are met but the attachment is nonetheless unsafe, pole owners can bring their safety concerns to the Commission. A narrow and carefully conditioned presumption in favor of boxing, however, will prevent pole owners from citing safety without support or as a pretense to unilaterally deny pole access to competitors.

B. Pole Owners' Anticompetitive Conduct Reinforces the Need For FCC Action.

Pole owners have continued to manipulate the existing rules and guidelines to unreasonably impair competitors' access to poles and conduit. For example, just a month after Fibertech filed its petition, Verizon altered its practice in Albany with regard to manhole surveys at least in part "due to the fact that Fibertech has complained to the FCC

¹⁴ Boxing refers to the practice of attaching wires on the side of the pole (usually the field side) away from existing lines. Boxing permits attachers to achieve the 12 inches of separation required between lines by using the side on the opposite side of the pole from existing attachments, minimizing the need for pole replacements.

¹⁵ Indeed, because boxing balances attachments and contributes to the stability of the pole, it may have engineering benefits.

¹⁶ See *infra* n.19.

¹⁷ Fibertech's proposal to presumptively allow boxing will in no way threaten safety, reliability, or security in the pole attachment process. Boxing is fully compliant with NESC requirements and the presumption in favor of boxing could be rebutted if an individual pole attachment posed such concerns.

about Verizon 'delays' with regard to Pole and Conduit applications."¹⁸ In apparent retaliation for Fibertech's request for regulatory relief, Verizon delayed a manhole survey requested for February 2, 2006 until March 15, 2006, and changed its policy in Albany to prevent Fibertech from observing the survey to confirm its accuracy. This just goes to show the need for the Commission to initiate a rulemaking to adopt Fibertech's proposals. Access to poles and conduit should be governed by issues of safety, reliability and engineering, not retaliation against rivals for seeking an even playing field – or for having the audacity to compete.

C. State Developments Highlight the Need for FCC Action.

Since Fibertech's Petition was filed, a number of states have acted on concerns that existing regulations are insufficient to prevent pole and conduit owners from manipulating access to these facilities for their own competitive gain. These state actions demonstrate a growing recognition of the problems outlined in Fibertech's Petition and the need for a uniform, comprehensive federal rulemaking by the Commission.

In October 2006, the Maine Public Utility Commission ("Maine PUC") concluded that certain Verizon pole attachment policies and requirements are "unjust and unreasonable" and mandated changes.¹⁹ In particular, the Maine PUC required Verizon to allow the practice of 'boxing' poles, pointing out that Verizon itself boxes poles for "essentially the same reasons that [competitors desire] to box poles – to save time and reduce costs."²⁰ The Commission should take note of Maine's straightforward and equitable approach, and move quickly towards a rulemaking to consider similarly fair-minded reforms.

In addition, just days after Fibertech's Petition was filed, the New Hampshire Public Service Commission ("NHPSC") issued an order finding that "the numerous complaints regarding various aspects of utility pole installation and maintenance" warranted an "investigation into poles-related issues."²¹ Although New Hampshire has not elected to regulate pole attachments, the NHPSC has opened a proceeding to investigate the subject and has been raising questions about the adequacy of pole owners' policies concerning competitive telecommunication providers' access to poles.

¹⁸ Fibertech Reply Comments, at Exhibit A, January 30, 2006 E-mail from Keith Rogers, Verizon, to Trixie Voellinger, Fibertech Networks, RM-11303 (filed March 1, 2006).

¹⁹ See *Oxford Networks f/k/a Oxford County Telephone Request for Commission Investigation into Verizon's Practices and Acts Regarding Access to Utility Poles*, Order, Docket No. 2005-486 (Maine PUC Oct. 26, 2006) *aff'd in part and modified in part* Order on Reconsideration (Maine PUC Feb. 28, 2007).

²⁰ *Id.* at 16.

²¹ *Verizon New Hampshire and Electric Utilities, Generic Investigation into Utility Poles*, Order No. 24,558, DM 05-172 (NH PSC Dec. 9, 2005).

Even more recently, Connecticut has opened a proceeding to review the make ready and attachment practices of pole owners in the state to determine whether current practices disadvantage those seeking to attach their facilities to poles.²² That on-going proceeding arose from Fibertech's complaint against a Connecticut pole owner, which raised concerns that pole owners have employed anti-competitive practices and discriminatory timeframes in pole licensing and attachment procedures that threaten to undermine the development of effective facilities-based competition in Connecticut.

Other states that are not currently regulating pole attachments have taken steps to do so. Arkansas, for example, just passed a law giving the Arkansas Public Service Commission authority to promulgate rules to regulate the rates, terms, and conditions of pole attachments and to hear and determine disputes arising from a utilities failure to provide access to poles.²³

This state action reveals the widespread nature of pole owners' discriminatory pole attachment policies and reflects a growing consensus that the Commission's current rules and policies are not adequate to prevent abuses. The Commission should, at a minimum, take this opportunity to scrutinize current pole and conduit access practices to determine whether reforms are needed to enable competitors to deploy facilities. Like New Hampshire, the Commission should respond to concerns about reasonable and nondiscriminatory pole and conduit access by opening a rulemaking proceeding.

D. A Comprehensive Rulemaking Is Required.

The record in this proceeding confirms that the current pole attachment system is broken, and is in need of industry-wide, comprehensive reform.²⁴ Most recently, Time Warner Telecom, Inc. ("TWTC") filed its "White Paper on Pole Attachment Rates Applicable To Competitive Providers Of Broadband Telecommunications Services" that provides additional evidence of the need for Commission action.²⁵ As TWTC explained, "the goal of eliminating the harmful consequences of the utilities' control over pole attachments, once viewed as a critical priority, must once again become a top priority for policy makers."²⁶ Fibertech could not agree more. The issue of unreasonably discriminatory pole attachment rates raised by TWTC's White Paper, however, is just one

²² See *DPUC Review of the State's Public Service Company Utility Pole and Make Ready Procedures*, Connecticut Department of Public Utility Control Docket No. 07-02-13.

²³ See H.B. 1636, 86th Gen. Assem., Reg. Sess. (Ark. 2007), available at <http://www.arkleg.state.ar.us/ftp/root/bills/2007/public/HB1636.pdf>.

²⁴ See Fibertech Reply Comments at 3-17 (summarizing comments in the record).

²⁵ See TWTC White Paper on Pole Attachment Rates Applicable To Competitive Providers Of Broadband Telecommunications Services, RM-11293 & RM-11303 (filed January 16, 2007).

²⁶ *Id.* at 23.

problematic aspect of the current regulatory regime. The most efficient and effective way to address the problem is through a comprehensive rulemaking.

Finally, although Fibertech is pleased that earlier this year the Commission granted its Complaint against North Pittsburgh Telephone Company ("NPTC"),²⁷ that proceeding illustrates the limitations of the current complaint-driven approach to ensuring nondiscriminatory access to poles and conduit. Adjudicating pole attachment complaints on a case-by-case basis is a time and resource consuming process. It took nearly two years for the Commission to resolve Fibertech's complaint seeking access to NPTC's poles to extend Fibertech's Pittsburgh-area network. During that time, NPTC continued to improperly deny access to Fibertech, preventing Fibertech's roll out of competitive services to prospective customers in the area. Where providers like Fibertech seek attachments needed to quickly bridge the final few hundred feet to a customer in response to a request for service, such delays effectively bar competition. In these circumstances, customers expect services to be delivered quickly, and even a few months' delay is more than enough for a competitor to lose its potential customer. Similarly, increasing deployment in response to customer demand will increase pole licensing requests. This volume is likely to increase the delays of the existing complaint process, further impeding competitive entry. By adopting comprehensive pole reform, the FCC can replace lengthy complaint proceedings with a simple and established series of best practices and thereby drive competition and deployment of advanced services.

For the reasons detailed above and in Fibertech's Petition for Rulemaking, the Commission should promptly open a rulemaking addressing Fibertech's Petition and tentatively conclude that poles may be boxed where (1) boxing is performed in accordance with the NESC and applicable state and federal regulations and safety codes and (2) facilities on the pole may be safely accessed by ladder or bucket truck.

Sincerely yours,



John T. Nakahata

Brita D. Strandberg

Stephanie Weiner

Counsel to Fibertech Networks, LLC

Cc:

²⁷ *Fibertech Technologies Networks LLC v. North Pittsburgh Telephone Company*, Memorandum Opinion and Order, EB-05-MD-014, FCC DA 07-486 (Feb. 23, 2007).